

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 69068 IN THE)
NAME OF SIEGEL-HORTON, LLC AND))
TRANSFER NO. 5823 IN THE NAME)
OF CRAIG A. CLARK AND ELLEN B.)
CLARK)
_____)

PRELIMINARY ORDER

This matter having come before the Idaho Department of Water Resources ("Department") in the form of protested applications for transfer and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Analysis, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. On December 5, 1997, the Snake River Basin Adjudication ("SRBA") court issued a partial decree for water right no. **34-00300** in the name of Grant Daniels and Reta Daniels as follows:

Source:	Antelope Creek tributary to Big Lost River
Priority:	June 1, 1885
Rate of diversion:	5.9 cubic feet per second ("cfs")
Points of diversion:	SE1/4SW1/4 Section 3, SW1/4NE1/4 (2 points), NW1/4SE1/4 Section 9, SW1/4NW1/4, NW1/4SW1/4 Section 10, all in T4N, R24E, B.M.
Use:	Irrigation
Season of use:	May 1 to October 15
Place of use:	257 acres within parts of Sections 2, 3, 9 and 10, T4N, R24E, B.M. in Custer and Butte Counties

Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order.
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2. On January 2, 1998, the SRBA court also issued a partial decree for water right no. **34-00442** in the name of Craig A. Clark and Ellen B. Clark as follows:

Source:	Antelope Creek tributary to the Big Lost River
Priority:	June 1, 1904
Rate of diversion:	3.2 cfs
Point of diversion:	NWSE Section 18, T4N, R24E, B.M.

Use: Irrigation
Season of use: May 1 to October 15
Place of use: 160 acres within parts of Sections 17, 20 and 21, T4N, R24E, B.M., Butte County

3. On June 8, 2000, Craig A. Clark and Ellen B. Clark ("Clark") filed Application for Transfer No. **5823**, renumbered to 68506, ("Clark application") with the Department proposing to essentially "trade" 1.6 cfs of water right no. 34-00442 with 1.6 cfs of water right no. 34-00300. The part of right 34-00442 being transferred is described as follows:

Identification No: **34-00442B**
Source: Antelope Creek
Priority: June 1, 1904
Rate of diversion: 1.6 cfs
Point of diversion: SESW Section 3, SWNW, NWSW Section 10, all in T4N, R24E, B.M.
Use: Irrigation
Season of use: May 1 to October 15
Place of use: 80 acres in parts of Sections 2, 3, 10 and 11, T4N, R24E, B.M.

4. On August 28, 2000, Siegel-Horton, LLC ("Siegel-Horton") filed Application for Transfer No. **69068** ("Siegel-Horton application") with the Department proposing to "trade" 1.6 cfs of water right no. 34-00300 with 1.6 cfs of water right no. 34-00442. The part of right 34-00300 being transferred is described as follows:

Identification No: **34-13618**
Source: Antelope Creek
Priority: June 1, 1885
Rate of diversion: 1.6 cfs
Point of diversion: NWSE Section 18, T4N, R24E, B.M.
Use: Irrigation
Season of use: May 1 to October 15
Place of use: 80 acres in parts of Section 20, T4N, R24E, B.M.

5. The remaining parts of the rights that are not involved in the applications for transfer are described as follows:

Identification No: **34-00442A**
Source: Antelope Creek
Priority: June 1, 1904
Rate of diversion: 1.6 cfs
Point of diversion: NWSE Section 18, T4N, R24E, B.M.
Use: Irrigation
Season of use: May 1 to October 15
Place of use: 80 acres in parts of Sections 17, 20 and 21, all in T4N,

R24E, B.M

Identification No: **34-13617**
Source: Antelope Creek
Priority: June 1, 1885
Rate of diversion: 4.3 cfs
Point of diversion: SE1/4SW1/4 Section 3, SW1/4NE1/4 (2 points),
NW1/4SE1/4 Section 9, SW1/4NW1/4, NW1/4SW1/4
Section 10, all in T4N, R24E, B.M.
Use: Irrigation
Season of use: May 1 to October 15
Place of use: 177 acres within parts of Sections 2, 3, 9 and 10, T4N,
R24E, B.M. in Custer and Butte Counties

6. The Department published notice of the applications that were subsequently protested by Trilby McAfee and Johnny King.

7. On May 22, 2002, the Department conducted a hearing in the matter. Applicant Clark was present and represented himself. Clark also addressed the Siegel-Horton, LLC. application as it related to the Clark application. The protestants were present and were represented by Johnny King and Tom Waddoups.

8. Issues the Department can consider in the matter are described as follows:

- a. Whether the proposed changes will injure other water rights.
- b. Whether the proposed changes will constitute an enlargement in use of the original right.
- c. Whether the proposed changes are in the local public interest.
- d. Whether the proposed changes are consistent with the conservation of water resources within the state of Idaho.

9. Exhibits accepted as a part of the record are as follows:

- a. Applicant's Exhibit 1 - Agreement Regarding Water Rights
- b. Applicant's Exhibit 2 - Affidavit of Don A. Barnett
- c. Applicant's Exhibit 3 - Letter dated November 5, 2001 to Craig Clark from Doug Rosenkrance
- d. Applicant's Exhibit 4 - Responses to Objections to Water Right Transfer No. T5823
- e. Applicant's Exhibit 5 - Schematic map of the general location of lands involved in the applications for transfer

10. The intent of the applicants is to trade equal portions of two water rights with different priorities between two different parcels of land that were historically in the same ownership. Both water rights divert from Antelope Creek. The upstream right has a 1904 priority and has historically been used to irrigate a parcel known as the Dry Fork

Ranch owned by Craig A. Clark and the downstream right has an 1885 priority and has historically been used to irrigate meadow land owned by Siegel-Horton.

11. The Clark application and Siegel-Horton application are interconnected and must be considered together. The applications will allow the Dry Fork Ranch to irrigate with a better priority than in the past and in return, a portion of the Siegel-Horton property will be irrigated with a later-in-time priority.

12. Right no. 34-13618 is presently used to irrigate 80 acres of meadow land. If the transfers are approved, this right would be used to irrigate 80 acres of alfalfa. The places of use under both the Clark application and Siegel-Horton application are presently irrigated and the applications do not propose the construction or use of new points of diversion.

13. The applicants contend that water use relative to forage production is more beneficial (more productive) raising alfalfa hay than raising grass hay in poorly-drained, wet meadow areas.

14. Watermaster records for Antelope Creek show that, as the rights presently are diverted from Antelope Creek and used, a water right with an 1885 priority is generally available for use 18 days longer each season than a water right with a 1904 priority.

15. The applicants did not present any information relative to water loss or gain in Antelope Creek between the point of diversion to the Dry Fork Ranch and the points of diversion to the meadow land of Siegel-Horton to show whether gains or losses in the creek would enlarge the water supply for diversion under the rights as requested in the applications for transfer. The applicants also did not show the effect, if any, of the inflow of Cherry Creek to Antelope Creek upon the period of water availability for right no. 34-00442B with a 1904 priority to be diverted at downstream points to the meadow land of Siegel-Horton.

16. The applicants did not show that return flow to Antelope Creek resulting from the use of water right no. 34-13618 on the Dry Fork Ranch would be as much as the return flow to Antelope Creek from use of the water right on the meadow land of Siegel-Horton. A reduction in return flows could reduce the water available at points of diversion downstream owned by the protestants or other water right holders.

17. The protestants contend that the transfer of right no. 34-13618 to the Dry Fork Ranch will enlarge water use because there will be less return flow to Antelope Creek via Dry Fork Creek, alfalfa produced on upland acreage is more consumptive of irrigation water than grass hay grown on naturally-wet meadow lands, and there will be a larger conveyance loss in the delivery ditch to the Dry Fork Ranch due to the more arid nature of the area.

18. The protestants also contend that the proposed changes will decrease the natural vegetation and animal habitat along Antelope Creek and will damage economic and aesthetic values of their property.

ANALYSIS

As originally decreed, right no. 34-00300, with an 1885 priority, authorized the irrigation of 257 acres of land. As proposed in the applications for transfer, 1.6 cfs of this right (34-13618) could physically be used to irrigate 160 acres of land decreed under right no. 34-00442, rather than on only 80 acres to which the right is sought to be transferred. The remaining 4.3 cfs of the right (34-13617) could physically be used to irrigate the original 257 acres of land decreed under the right rather than only on the 177 acres remaining after the transfer of 1.8 cfs of the right.

The applicants' use of the 1885 water right on more acres than the right was originally used will enlarge the water use. While the rate of diversion is not enlarged, if the right is used for a longer period of time or upon more acres, a larger volume of water will be diverted from the water source, enlarging the use and injuring other water rights. The applicants did not offer any proposals or suggest administrative means to prevent this type of enlargement in use and injury.

The applicants did not provide information on gains or losses to Antelope Creek in the reach from the point of diversion of the junior priority right held by the Clarks for Dry Fork Ranch to the most downstream point of diversion for the earlier priority right held by Siegel-Horton. Without this information, including information on the effect of Cherry Creek flows on the availability of water for the junior priority right, a determination cannot be made whether the use of water will be enlarged under one or both of the water rights sought to be transferred.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. The applicants carry the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with conservation of the water resources within the state of Idaho.

3. Both the applicants and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicants have the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

5. Although the applications do not propose to irrigate more acres than are already irrigated and do not propose to use points of diversion that are not already in existence, the record does not establish that an enlargement in the use of water will not occur if the transfer applications are approved. Because changes are not proposed to the existing irrigation systems, the entire acreage now irrigated can be irrigated with the earlier priority water right. Clark did not describe or demonstrate how the 1.6 cfs sought for transfer under 34-13618 (with an 1885 priority) would not be used on more than 80 acres of land. Siegel-Horton did not show how water right 34-13617 (the remainder of the 1885 right) would not be used on more meadowland than the remaining 177 acres if the applications for transfer were approved.

6. The applicants did not meet their burden of proof to establish that moving the rights as proposed in the applications would not enlarge the supply of water available to the rights.

7. The applicants did not show how use of water under the applications overcome the public interest concerns raised by the protestants.

8. The applications will enlarge water use and are not in the local public interest.

9. The Department should deny the applications, since the applicants did not meet their burden of proof.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. **T5823** in the name of Craig A. Clark and Ellen B. Clark is **DENIED**.

IT IS FURTHER hereby ORDERED that Application for Transfer No. **T69068** in the name of Siegel-Horton, LLC is **DENIED**.

Signed this 1st day of July, 2002.

____ Signed _____
L. GLEN SAXTON, P.E.
Hearing Officer